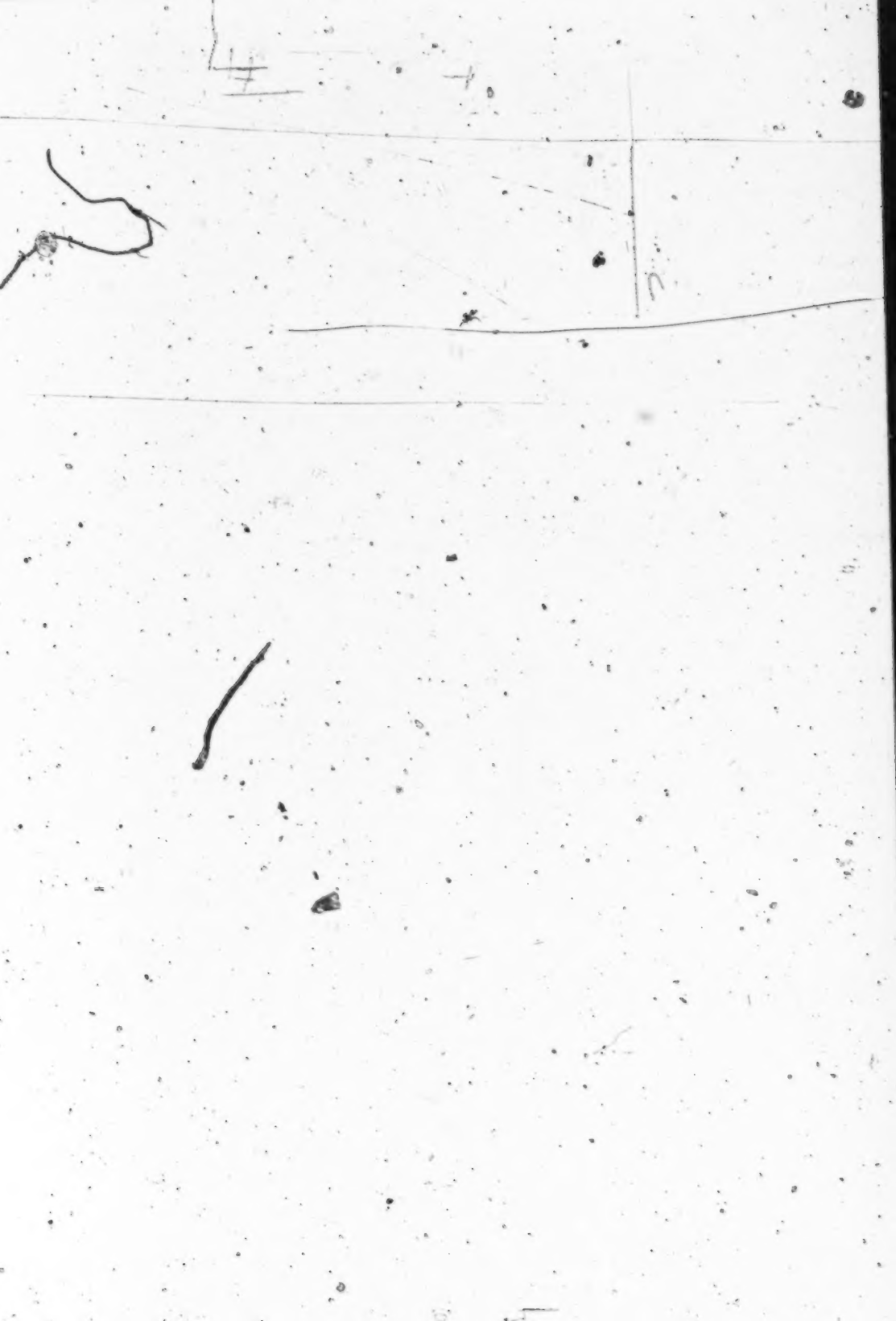

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In the Supreme Court of the United States

OCTOBER TERM 1937

No. —

UNITED STATES OF AMERICA, PETITIONER

v.

KATHLEEN MCCLURE, AS ADMINISTRATRIX OF THE ESTATE OF JOHN F. MCCLURE, DECEASED, AND INDIVIDUALLY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit entered in the above entitled case March 28, 1938.

OPINION BELOW

The District Court rendered no opinion. The opinion of the Circuit Court of Appeals (R. 49–59) is reported in 95 F. (2d) 744.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 28, 1938 (R. 59). The jurisdiction of this Court is invoked under Section 240 (a)

of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the provisions of Section 305, World War Veterans' Act, 1924, are applicable to effect a revival and continuance of lapsed yearly renewable term insurance to the date of a total permanent disability occurring after July 2, 1927, despite the provisions of Section 301 of that Act, as amended, that all yearly renewable term insurance should cease on that date, with certain specified exceptions which did not include continuance of insurance under Section 305.

STATUTES INVOLVED

Section 301 of the World War Veterans' Act, 1924, as amended June 2, 1926, c. 449, 44 Stat. 686, 687 (U. S. C., Title 38, Sec. 512), provides in part as follows:

> Except as provided in the second paragraph of this section, not later than July 2, 1927, all term yearly renewable insurance held by persons who were in the military service after April 6, 1917, shall be converted, without medical examination, into such form or forms of insurance as may be prescribed by regulations and as the insured may request. Regulations shall provide for the right to convert into ordinary life, twenty-payment life, endowment maturing at age sixty-two, five-year level premium

term, and into other usual forms of insurance, * * *.

All yearly renewable term insurance shall cease on July 2, 1927, except when death or total permanent disability shall have occurred before July 2, 1927: *Provided, however,* That the director may by regulation extend the time for the continuing of yearly renewable term insurance and the conversion thereof in any case where on July 2, 1927, conversion of such yearly renewable term insurance is impracticable or impossible due to the mental condition or disappearance of the insured.

In case where an insured whose yearly renewable term insurance has matured by reason of total permanent disability is found and declared to be no longer permanently and totally disabled, and where the insured is required under regulations to renew payment of premiums on said term insurance, and where this contingency is extended beyond the period during which said yearly renewable term insurance otherwise must be converted, there shall be given such insured an additional period of two years from the date on which he is required to renew payment of premiums in which to convert said term insurance as hereinbefore provided: *Provided,* That where the time for conversion has been extended under the second paragraph of this section because of the mental condition or disappearance of the insured, there shall be allowed to the insured

an additional period of two years from the date on which he recovers from his mental disability or reappears in which to convert.

* * * * * *

Section 305 of the World War Veterans' Act, 1924 (June 7, 1924, c. 320, 43 Stat. 607, 626; U. S. C., Title 38, Sec. 516), provides:

> Where any person has heretofore allowed his insurance to lapse while suffering from a compensable disability for which compensation was not collected and dies or has died, or becomes or has become permanently and totally disabled and at the time of such death or permanent total disability was or is entitled to compensation remaining uncollected, then and in that event so much of his insurance as said uncollected compensation, computed in all cases at the rate provided by section 302 of the War Risk Insurance Act as amended December 24, 1919, would purchase if applied as premiums when due, shall not be considered as lapsed; and the United States Veterans' Bureau is hereby authorized and directed to pay to said soldier, or his beneficiaries as the case may be, the amount of said insurance less the unpaid premiums and interest thereon at 5 per centum per annum compounded annually in installments as provided by law.

Other statutes mentioned in this petition, together with an excerpt from testimony before a Congressional committee, letters and a certificate from the Administrator of Veterans' Affairs, and

an opinion of the General Counsel of the Veterans' Bureau, are contained in the Appendix, *infra*, pp. 18–30.

STATEMENT

This suit was originally brought by John F. McClure in the District Court of the United States for the Eastern District of Washington to recover total and permanent disability benefits under a contract of yearly renewable term insurance (R. 51).[1] McClure died, and the respondent, Kathleen McClure, then filed an amended complaint (R. 2–6), as administratrix of his estate and in her individual capacity, to recover both total and permanent disability and death benefits (R. 5–6), alleging, in the alternative, that he was totally and permanently disabled at the time of his discharge from the military service, January 29, 1919, before he ceased paying the premiums due on the insurance, or if not then so disabled, that he became so later, while the insurance was in force, presumably under the provisions of Section 305 of the World War Veterans' Act, 1924, *supra* (R. 3–4).

The Government, in its answer, denied all of the allegations in the amended complaint except those relating to the military service of the insured and the appointment of respondent as administratrix (R. 7–9), but at the trial of the case before the court, without a jury, pursuant to stipulation (R. 22), both parties submitted proposed findings of

[1] The record does not contain the original complaint.

fact an conclusions of law (R. 9–17, 22–28), from which it appears that there was no substantial dispute as to the facts, including the fact that the insured became totally and permanently disabled in 1929 (R. 11, 15, 23, 26), and that only issues of law were presented as to whether, in view of the provisions of Section 301, *supra*, for the termination of yearly renewable term insurance on July 2, 1927, Section 305, *supra*, effected a revival and continuance of the insurance involved herein to the date of permanent and total disability in 1929. (See plaintiff's proposed finding No. VII (R. 11, 24) and defendant's proposed finding No. VIII (R. 16, 27).)* The trial court entered findings of fact (R. 28–30) to the effect that the insured was granted a policy of war risk term insurance in the sum of $10,000, on which premiums were paid to include the month of January, 1919; that he became permanently and totally disabled December 1, 1929; that on the date he permitted his policy to lapse for failure to pay the premium then due he was suffering from a "compensable disability" for which compensation was due and uncollected; and that on the date of total and permanent disability there was due and uncollected compensation in an

*The Government also urged by its proposed finding No. VII (R. 15–16, 27) that Section 305 was repealed by the Economy Act of March 20, 1933 (U. S. C., Title 38, Sec. 717), but abandoned this contention in the Circuit Court of Appeals (R. 59).

amount sufficient to have paid all the premiums due on the policy since the date of its lapse (R. 29).

At the same time the court entered conclusions of law to the effect, *inter alia*, that respondent was not entitled to recover (R. 30), basing its decision upon the ground that the insurance was not revived and continued under Section 305, *supra*, beyond July 2, 1927, in view of the provisions of Section 301, *supra*.[1] Judgment was accordingly entered for the Government (R. 19–20), and respondent appealed, assigning error to all rulings of the trial court adverse to her (R. 36–40).

The Circuit Court of Appeals for the Ninth Circuit reversed, holding (R. 49–59): (1) That Section 305 is not limited by Section 301; that Section 305 does not extend or renew insurance, or continue it in force, but merely provides for the payment of a gratuity in the form of insurance; that there is no conflict or relation between this section and Section 301; (2) that if it were assumed that a conflict exists between Sections 301 and 305, the provisions of the latter are special, in that they provide for payment of benefits under special circumstances, and therefore must be held to control, as against the general declaration in Section 301 that yearly renewable term insurance should cease

[1] This is shown by the court's refusal (R. 18, 31) of the plaintiff's proposed finding No. VII (R. 11, 24) and the acceptance (R. 17–18, 31) of the defendant's proposed finding No. VIII (R. 12, 27).

on a certain date; (3) that an estimate of the cost to the Government of proposed amendments to Sections 301 and 305, furnished to Congressional Committees in 1926, by the Director of the Veterans' Bureau, in which he expressed an assumption to the effect that the termination of yearly renewable term insurance by Section 301 would preclude a revival and continuance of such insurance under Section 305 until total permanent disability or death occurring thereafter, should be denied significance because the estimate embodying this administrative interpretation was not incorporated in "the report of the committee", and because, in any event, it did not "purport to state an administrative practice"; (4) that amendments to Sections 301 and 305 in 1928 did not indicate Congressional adoption of the administrative interpretation, repeated at that time in an administrative opinion,* because, the court stated, that opinion was ren-

* The Government filed in the Circuit Court of Appeals a copy of an opinion rendered by the General Counsel of the Veterans' Bureau, approved by the Director in February 1928, to the effect that Section 305 was inapplicable to revive yearly renewable term insurance when the total and permanent disability or death of the insured occurred subsequent to July 2, 1927, the date fixed for the termination of such insurance by Section 301. The copy of this opinion was accompanied by a certificate of the Administrator of Veterans' Affairs, dated September 24, 1937, to the effect that the opinion was a precedent which had been applied, without modification, in administrative practice under Section 305, since it was rendered. The opinion and the Administrator's certificate appear in the Appendix, *infra*, pp. 22–26.

dered only shortly prior to the passage of the Act containing the amendments; (5) that a long continued administrative practice requiring judicial consideration was not shown,* and that, in any event, the statute involved is too clear to permit resort to administrative practice.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

(1) In holding that a right to benefits under Section 305, World War Veterans' Act, 1924, may exist in a case involving a lapsed policy of yearly renewable term insurance where the total and permanent disability of the insured occurred after July 2, 1927, the date fixed for the termination of such insurance by Section 301 of that Act, as amended.

(2) In holding that Section 305 is not limited by the provisions of Section 301 for the termination of yearly renewable term insurance on July 2, 1927.

(3) (a) In holding that the benefits provided by Section 305 were gratuities and not founded upon contracts of insurance and were not intended to be subject to the limitations applicable to such contracts contained in other sections of the World War Veterans' Act, including Section 301.

(b) If the court was correct in so holding, in failing to hold further that the District Court was without jurisdiction of respondent's suit, since Section 19 of the World War Veterans' Act authorizes suit only upon claims "under a contract of insurance."

* See footnote 4, p. 8.

(4) In misapplying well established principles of interpretation to Sections 301 and 305.

(5) In disregarding the administrative interpretation of Sections 301 and 305 and the long continued administrative practice pursuant to such interpretation.

(6) In reversing the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

(1) The decision of the Circuit Court of Appeals is squarely in conflict with the decision of the Circuit Court of Appeals for the Tenth Circuit on rehearing in *Skelton* v. *United States*, 88 F. (2d) 599. There it was held that revival and continuance of yearly renewable term insurance under Section 305 was limited to cases where total and permanent disability or death occurred prior to July 2, 1927, by virtue of the provisions in Section 301 that such insurance should cease on that date. The court below, in its opinion, conceded the existence of the conflict and the importance of the question involved, stating: "The importance of the question involved and the disagreement we have expressed with the decision of the Tenth Circuit will no doubt require consideration of the question by the Supreme Court" (R. 59).

(2) That the question involved is of public importance cannot be doubted in view of a recent estimate made by the Administrator of Veterans' Affairs to the effect that "the final total cost" to

the Government, if the decision of the court below should be followed, would be "many millions of dollars." See Administrator's letter to the Solicitor General, dated June 9, 1938, Appendix, *infra*, pp. 26-30. It is reasonable to anticipate, the Administrator states, that the amount of benefits to be payable upon revivals of yearly renewable term insurance as of a period of several years after July 2, 1927, would amount to approximately three and one-half million dollars a year, since approximately the same amount was awarded upon revivals of such insurance during the year preceding that date.

(3) The decision of the court below holds, in effect, that the benefits provided by Section 305, are gratuities, not founded upon contract and not to be treated as founded upon contract. This holding is substantially in conflict with the unanimous decisions of a number of Circuit Courts of Appeals. These courts have held that Section 19 of the World War Veterans' Act (U. S. C., Title 38, Sec. 445), which confers jurisdiction upon District Courts of cases in which there has been a disagreement "as to claim *under a contract of insurance,*" embraces claims under Section 305. (*United States* v. *Ellison*, 74 F. (2d) 864, 868 (C. C. A. 4th), certiorari denied, 295 U. S. 750; *United States* v. *Sellers*, 75 F. (2d) 623 (C. C. A. 5th), certiorari denied, 295 U. S. 763; *United States* v. *Knott*, 69 F. (2d) 907 (C. C. A. 6th); *United States* v. *Hendrickson*, 53 F. (2d) 797 (C. C. A. 10th); *United States*

v. *Vance*, 48 F. (2d) 472 (C. C. A. 8th).) There would seem to be no reason why the benefits conferred by Section 305 should not be regarded as derived from an insurance contract for the purposes of the provisions in Section 301, as well as for the purposes of Section 19. The decision of the court below would seem also to be in conflict with *United States* v. *Weaver*, 86 F. (2d) 372 (C. C. A. 4th), in which it was held that the rights conferred by Section 305 were not gratuities, but contractual rights, and hence were protected by the Fifth Amendment from impairment. Cf. *United States* v. *Jackson*, 89 F. (2d) 572 (C. C. A. 4th), affirmed by this Court, 302 U. S. 628. If, however, the court below is correct in the view that the benefits provided by Section 305 are gratuitous, not founded upon contract and not to be so treated, with the result that the provisions of Section 301 relating to contracts have no application, then it would seem to follow that Section 19, World War Veterans' Act, authorizing suit only upon claims "under a contract of insurance" is likewise inapplicable for precisely the same reasons, and the court below should have held that the District Court was without jurisdiction of the instant suit.

4. The decision of the Circuit Court of Appeals is in conflict with well established principles of statutory construction.

(a) The effect of the decision is to treat the revival provisions in Section 305 and its predecessor,

Section 408 of the War Risk Insurance Act (Appendix, *infra*, pp. 18–19), as constituting an implied amendment of the limitation provisions of Section 301 and its predecessor, Section 404, War Risk Insurance Act (Appendix, *infra*, p. 18), contrary to the well settled rule of statutory construction that such amendments are not favored, and that an intention to amend will not be imputed unless the statutes involved admit of no other construction. *Rosencrans* v. *United States*, 165 U. S. 257, 262; *Frost* v. *Wenie*, 157 U. S. 46, 58; *Washington* v. *Miller*, 235 U. S. 422, 428; *United States* v. *Healey*, 160 U. S. 136, 147; *United States* v. *Burroughs*, 289 U. S. 159, 164. This is true because a time limitation had already been placed upon yearly renewable term insurance when the provisions for revival and extension of lapsed insurance were first enacted and made prospectively effective with respect to the death or total and permanent disability of the insured. (See Section 408 of the War Risk Insurance Act, as amended, Appendix, *infra*, pp. 18–19; *Skelton* v. *United States*, *supra*.)

(b). The decision treats the revival provision of Section 305 as a special statutory provision controlling what the court considered the general limitation provision of Section 301 (R. 55, 57). It is submitted that the correct view is just the reverse; that Section 305 and its predecessor, Section 408, War Risk Insurance Act, are general provisions, in that they relate to the revival of all forms of insurance,

and must therefore yield to the provisions in Section 301 and its predecessor, Section 404, War Risk Insurance Act, for the termination of insurance, which are plainly special in nature since they relate only to yearly renewable term insurance. *Townsend* v. *Little*, 109 U. S. 504, 512; *Skelton* v. *United States*, *supra*, pp. 603-604.

(c) The decision ignores the fact that the administrative interpretation that yearly renewable term insurance could not be revived under Section 305 after the date for its termination, as fixed in Section 301, was clearly disclosed to Congressional committees by the Director of the Veterans' Bureau in 1926,* and was reiterated in an opinion approved by the Director in 1928 (Appendix, *infra*, pp. 22–26), and also the fact that this interpretation has been followed for ten years in administering the Act.† Despite these facts Congress in 1926, subsequent to the first expression of the administrative interpretation, in extending the time limitation upon term insurance from July 2, 1926, to July 2, 1927, provided exceptions to the limitation without reference to the revival and continuance of insur-

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*Contrary to the apparent assumption in the opinion (R. 58), a letter from the Director of the Veterans' Bureau disclosing the administrative interpretation was brought to the attention of Congress itself by being attached to Committee Reports. (Appendix, *infra*, pp. 19-20.)

†See certificate of the Administrator of Veterans' Affairs, filed in the Circuit Court of Appeals. (Appendix, *infra*, p. 22.)

ance under Section 305 (see Sec. 301, as amended, *supra*), and thereafter, without indicating disapproval of the administrative interpretation, Congress amended Sections 301 and 305 in 1928, shortly after the release of the opinion mentioned above, and in 1930 and 1932 amended Section 301. (See U. S. C., Title 38, Secs. 512, 516.) We submit that, as stated in the opinion on rehearing in the *Skelton* case, *supra*, p. 604, this silence must be regarded as acquiescence.

3. The court below suggests, in effect (R. 54), that any time limitation upon the application of Section 305 would be inconsistent with the purpose of that section. We submit that this view ignores the effect of the passage of time upon the practical considerations giving rise to the enactment of this legislation. Undoubtedly the purpose was to restore insurance, presumably lost through no fault of the insured because of delay on the part of the Government in paying compensation for service-incurred disabilities, upon the further presumption that such compensation, if paid, would have been used to continue the insurance or to reinstate it. But it is reasonable to assume that when the provisions for revival were first enacted and made prospectively effective (Appendix, *infra*, pp. 18–19), Congress recognized that as the period of service became more remote the cases in which compensation was unpaid because of delay on the part of the Government in acting upon claims, would progres-

sively decrease to the point of disappearance and that the opposite presumption would arise that compensation was unpaid only because of delay on the part of the veteran in claiming it or in supporting the claim by satisfactory evidence, and consequently that Congress intended that the time limit then fixed upon term insurance should preclude a subsequent revival of such insurance under Section 305.

The fact to which the court alludes (R. 54), that no such limitation as that contained in Section 301 with reference to yearly renewable term insurance was placed upon the revival of converted insurance, provides no reason for concluding that Congress intended the former to be without time limit upon its revival and continuance. The different status of the holders of the two types of insurance results appropriately from differences in their terms and conditions. Term insurance had a lower premium rate but was temporary; converted insurance has a higher premium rate but is permanent. The fact that after the expiration of the temporary form of insurance it is not subject to revival, is of no more significance than is the fact that the amount of insurance revived by a given sum of compensation varies with the premium rate, which in turn is dependent upon whether the insurance is yearly renewable term, ordinary life, or some other type of converted insurance. The higher premium rate on converted

insurance, together with the fact that the statute originally provided for the revival of insurance only in cases where the uncollected compensation would equal or exceed the entire sum of the premiums unpaid (Appendix, *infra*, pp. 18–19) permitted revival of comparatively few of such policies and of a comparatively small amount of insurance thereunder.*

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be granted.

ROBERT H. JACKSON,
Solicitor General.

JUNE 1938.

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*The difference in the premium rates between term and converted insurance accounted for the controversy involved in *United States* v. *Madigan*, 300 U. S. 500, 503.

APPENDIX

The first authority to grant war risk insurance is contained in the Act of October 6, 1917, c. 105, Sec. 2, 40 Stat. 398, 409–410, amending the War Risk Insurance Act by adding the following section, among others:

> SEC. 404. That during the period of war and thereafter until converted the insurance shall be term insurance for successive terms of one year each. Not later than five years after the date of the termination of the war as declared by proclamation of the President of the United States, the term insurance shall be converted, without medical examination, into such form or forms of insurance as may be prescribed by regulations and as the insured may request. Regulations shall provide for the right to convert into ordinary life, twenty payment life, endowment maturing at age sixty-two, and into other usual forms of insurance and shall prescribe the time and method of payment of the premiums thereon. * * *

Section 408 was added to the War Risk Insurance Act by the Act of August 9, 1921, c. 57, Sec. 27, 42 Stat. 147, 156–157, and was amended by the Act of March 4, 1923, c. 291, Sec. 7, 42 Stat. 1521, 1525–1526, to provide, in part:

> SEC. 408. * * * That where any soldier has heretofore allowed his insurance to lapse, while suffering from wounds or disease suffered or contracted in line of service, and was at the time he allowed his [said policy] *insurance* to lapse entitled to compen-

sation on account thereof in a sum equal to or in excess of the amount due from him in premiums on his said insurance, and [has since died] *dies or has died* from said wounds or disease, *or becomes or has become permanently and totally disabled by reason thereof*, without collecting [or making claim for] said compensation [or being allowed to reinstate his said policy on account of his physical condition], *and at the time of such death or permanent total disability had or has sufficient uncollected compensation to pay all unpaid premiums*, then and in that event said policy shall not be considered as lapsed, and the *United States* Veterans' Bureau is hereby authorized and directed to pay to the *said soldier or his* beneficiaries [of said soldier] under said policy the amount of said insurance, less the premiums and interest thereon at 5 per centum per annum compounded annually in installments as provided by law: * * *. [Italics represent words added by the amendatory Act. Words in the prior Act, omitted by amendment, are enclosed in brackets.]

Copies of the following letter from the Director of the United States Veterans' Bureau to the Chairman of the House Committee on World War Veterans' Legislation were attached to the Committee Report (H. Rept. No. 515, 69th Cong., 1st Sess.), made on March 11, 1926, in connection with a bill (H. R. 10240) to amend Sections 301 and 305 of the World War Veterans' Act, 1924, and to the Report of the same Committee (H. Rep. No. 1217, 69th Cong., 1st Sess.), made on May 14, 1926, in connection with a substitute bill (H. R. 12175):

UNITED STATES VETERANS' BUREAU,
Washington, March 10, 1926.

Hon. ROYAL C. JOHNSON,
Chairman House Committee on World War Veterans' Legislation, House of Representatives, Washington, D. C.

MY DEAR MR. JOHNSON:

* * * * *

Section 15 amends section 301 to provide for the continuation of term insurance for a period of three years. The chief effect of such a continuation would be the increased cost due to the continued application of section 305, assuming that section 305 under the present law is not effective subsequent to July 2, 1926. Based upon current experience, the amount of term insurance which might be brought in under section 305 by the continuation of the term-insurance provisions for another three years is estimated at $105,039,900. Payment on this insurance would continue over approximately 20 years, accumulating each year as follows: First year, $5,252,000; Second year, $10,504,000; Third year, $15,756,000.

Section 18 amends section 305 by limiting the class of beneficiaries. The above estimate of costs due to the continuation of term insurance through the amendment of section 301 can, therefore, be discounted by 45 per cent, with the resultant value of insurance which might be brought in totaling $57,771,945. Through this limitation there results, therefore, a material saving each year as follows: First year, $2,362,000; Second year, $4,724,000; Third year, $7,086,000.

Net cost of extension of term insurance:

First year, $2,890,000; Second year, $5,780,000; Third year, $8,670,000.

* * * * *

FRANK T. HINES, *Director.*

When H. R. 12175 was before the Senate Committee on Finance, the Director of the Veterans' Bureau testified before that Committee on May 24, 1926, as follows:

> Section 17 amends Section 304 and provides for the extension of term insurance for one year. The chief effect of the continuation of term insurance will be the cost of the cases revived under Section 305, *assuming that Section 305 under the present law is not effective for cases dying or becoming permanent total subsequent to July 2, 1926, and further assuming that the application of Section 305 will not be effective under this provision for cases dying or becoming permanent total subsequent to July 2, 1927.* Based upon current experience the term insurance which might be brought in under Section 305 by continuation of term insurance for one year will cost annually, at the rate of $57.50 per month for $10,000, approximately $1,839,540; however Section 18 amends Section 305 by limiting the class of beneficiaries for insurance revived under Section 305 to the widow, child, or parent. It is, therefore, believed that the above estimate of cost due to the continuation of term insurance can be discounted by 45 percent, with the resultant annual saving of approximately $827,780. The net cost of continuation of term insurance for a period of one year would, therefore, be approximately $1,011,750. (Italics supplied.)
>
> (Hearings before the Senate Committee on Finance on H. R. 12175, May 24, 1926. p. 13.)

The following certificate of the Administrator of Veterans' Affairs, dated September 24, 1937, and a copy of the opinion of the General Counsel of the Veterans' Bureau, approved by the Director of the Bureau on February 27, 1928, were filed with the Clerk of the Circuit Court of Appeals for the Ninth Circuit in the instant case:

UNITED STATES OF AMERICA,
VETERANS' ADMINISTRATION,
September 24, 1937.

I hereby certify that the annexed photostats are those of an opinion rendered by the former General Counsel of the Veterans' Bureau on February 23, 1928, addressed to me as Director of said Bureau, to constitute a precedent for the administrative construction of Section 305 of the World War Veterans' Act, 1924, as amended. I further certify that said opinion was approved by me as Director on February 27, 1928, and was followed administratively by the Veterans' Bureau, has not been modified, and is still applied as the administrative practice of the Veterans' Administration.

In witness whereof, I have hereunto set my hand, and caused the seal of the Veterans' Administration to be affixed on the day and year first above written.

[SEAL] (Signed) FRANK T. HINES,
Administrator of Veterans' Affairs.

UNITED STATES VETERANS' BUREAU,
Date: *February 23, 1928.*
LL–14

Memorandum from: The General Counsel.
To: The Director.
Subject: Cherniavsky, Morris, XC–400,962.

The Adjudication Service has presented this case for an opinion and as the establish-

ment of a precedent is involved the opinion is referred to you for your approval.

The Adjudication Service has prepared the following summary of facts:

"This man executed an application for insurance while in service, but allowed this insurance to lapse for non-payment of the premium due September 1, 1919. The man had been discharged on August 22, 1919, and, following his discharge, he executed an application for compensation, on which application he has been rated as being disabled in various degrees until the date of his death on July 20, 1927. At the time of the lapse of the insurance his disability was of a compensable degree.

"Following his death, it was determined that while he had been rated less than 10 per cent disabled from August 9, 1924, as an actual fact he was temporarily partially 62 per cent disabled from that date to November 3, 1924, less than 10 per cent from that date to July 1, 1926, and entitled to the statutory award for arrested tuberculosis in the amount of $50 monthly from July 2, 1926, to July 20, 1927.

"You will note that this claimant was not permanently and totally disabled at any time prior to his death, which occurred on July 20, 1927, and therefore the question is herewith presented to your Service whether a claimant who dies subsequent to July 2, 1927, and who was not permanently and totally disabled at any time prior thereto, comes within the provisions of Section 305 of the World War Veterans' Act as amended, if there is compensation due and unpaid for a period prior to the date of his death."

The question is whether Section 305 of the World War Veterans' Act, as amended, has application to term insurance where there has been neither permanent and total disability nor death at any time prior to July 2, 1927, the ending date for term insurance.

Section 304, World War Veterans' Act (last proviso), is to the effect that no yearly renewable term insurance shall be reinstated after July 2, 1927. The second paragraph of Section 301, World War Veterans' Act, as amended, provides in substance that all yearly renewable term insurance shall cease on July 2, 1927, except where death or total permanent disability shall have occurred before that date with the proviso that the Director may extend the time for continuing yearly renewable term insurance where on July 2, 1927, conversion is impracticable or impossible by reason of mental condition or disappearance of the insured.

Section 305 of the World War Veterans' Act, as amended, of course, has application both to term and converted insurance and is to the effect that where any person has heretofore allowed his insurance to lapse, or has canceled or reduced any or all of the insurance, and where the other requirements of Section 305 have been met such insurance shall not be regarded as having lapsed.

It may be noted generally that government insurance, both term and converted, may be discontinued (a) either by the government or (b) by the insured. The insured may end his insurance in whole or in part by some affirmative act such as cancellation or reduction or by failure to act, as where the insurance lapses for failure to pay premiums. The provisions of Section 305, World War Veterans' Act, and for that mat-

ter the provisions of Section 408 of the War Risk Insurance Act deal with cases where the insured has discontinued his insurance, whereas the last proviso of Section 304, World War Veterans' Act, and the second paragraph of Section 301, World War Veterans' Act, deal with the discontinuance of the insurance through some act of the government.

In the present case the term insurance lapsed prior to July 2, 1926, through failure of the insured to pay premiums, and at the time of the lapse of the insurance his disability was of a compensable degree. Further, there was uncollected compensation at the date of lapse. Therefore, it would appear normally that the first proviso of Section 305 has been met. The second requirement of Section 305 is that there should have been uncollected compensation due at the maturity of the insurance, either through permanent and total disability or through death. In the present case the death was after July 2, 1927, and there was no permanent and total disability prior to July 2, 1927. Therefore, assuming that there was uncollected compensation at the date of lapse so that the first requirement of Section 305 has been met, if an attempt be made to apply that Section in the present case the insurance would be prevented from lapsing up to July 2, 1927, at which time the term insurance by act of the Government was ended. Clearly in this case the term insurance did not mature before July 2, 1927, so that it cannot be said that the case would be covered by this language in paragraph 2 of Section 301 "except where death or permanent total disability shall have occurred before July 2, 1927." Neither, on the assumption that Section 305 might be applied to

carry the term insurance to July 2, 1927, can it be said that there are grounds for continuing the term insurance after the dead line because there is nothing to show that conversion was impracticable or impossible because of the mental condition or disappearance of the insured.

Having in mind the fact that from the very beginning of war risk legislation it has been clearly understood that the yearly renewable term insurance was temporary in its nature and subject to ultimate termination by the government; and having in mind that from a relatively early date Congress has seen fit to declare that term insurance could not be carried beyond a specified date, which date has been extended from time to time; and having in mind that the final extension expired under the present act, July 2, 1927, it is the opinion of this Service that Section 305 cannot be applied to prevent the lapse of term insurance where there was neither death nor total permanent disability before July 2, 1927.

(Signed) WILLIAM WOLFF SMITH.

Director's Office, Feb. 27, 1928.

Approved: F. T. H., *Director*.

Letter from the Administrator of Veterans' Affairs to the Solicitor General:

VETERANS' ADMINISTRATION,
Washington, June 9, 1938.

Office of The Administrator of Veterans' Affairs.

The Honorable The SOLICITOR GENERAL,
Department of Justice, Washington, D. C.

MY DEAR SOLICITOR GENERAL: Further reference is made to your request of May 16, 1938, that I furnish a letter to certain an estimate of the probable expense to the

United States Government if the decision of the Circuit Court of Appeals of the 9th Circuit, March 28, 1938, in the case of Kathleen McClure vs. the United States should be followed.

As preliminary to certain statistics hereinafter discussed, I would state that the Veterans' Administration as well as the Veterans' Bureau has construed Section 305 of the World War Veterans Act in connection with Section 301 of the same Act so as to give effect to the time limitation in the latter Section; that is to say, it has been held that Section 305, World War Veterans Act, would not apply where the date of death or of permanent and total disability was subsequent to the dead line for term insurance under Section 301. The Circuit Court of Appeals, 10th Circuit, Skelton vs. United States, 88 Fed. (2) 599, March 2, 1937, held in accordance with this practice but recently the Circuit Court of Appeals in the 9th Circuit in the McClure case cited by you held to the contrary.

It is noted from the opinion of the Court in the McClure case that the Government relied on the Administrative practice and brought to the attention of the Court the opinion of a former General Counsel in the case of Morris Cherniavsky, XC-400,962, February 23, 1928 (50 G. C. 413). The Court evidently thought that this was an isolated case and apparently was not aware of the fact that it was a precedent forming opinion on which an Administrative policy has rested of more than ten years' duration. I quote the following from the opinion in the Cherniavsky case which was approved as a precedent February 27, 1928:[1]

* * * * *

[1] The quotation is omitted to avoid repetition.

Although the Meyrowitz opinion did not cite the Cherniavsky case by name or number, it is consistent therewith. The question was again considered on January 28, 1930, in the case of David Biggerstaff, C-456,804 (General Correspondence 231). In the Biggerstaff case, the onset of the permanent and total disability was November 28, 1928, and the claim was disallowed with a specific reference to the Cherniavsky precedent.

Covering the interval from February 1928 to January 1930 this question was considered specifically on three occasions, but this circumstance would not justify the conclusion that these three individual cases represented all the claims in which this Administrative practice was applied. It is not possible to list all of the cases involving Section 305 which were disallowed under this practice, and while there are not available statistics to show precisely the number of rejections, a conservative estimate would put the total number of such disallowed claims as at least one thousand. In addition, there have been thousands of cases in which no claim for insurance was ever filed because of the generally understood rule that Section 305, World War Veterans' Act, 1924, as amended, would not apply when death or permanent and total disability was after the dead line for term insurance.

I would suggest that since the amendment to the World War Veterans' Act approved June 2, 1926 (Public, No. 325, 69th Congress), amended Section 301 of World War Veterans' Act so as to permit the continuance of term insurance from July 1926 to July 1927, undoubtedly such an extension would have covered a large number of cases under Section 305 and that hence any estimate in connection with this one year exten-

sion would be of value in considering the possible cost to the United States Government should the theory of the McClure case be upheld. In 1926 there were pending a number of bills involving various propositions as to the extension of term insurance and while the Act of June 2, 1926, to-wit, Public, 325, 69th Congress, was a Senate bill, S. 3097, there was a similar bill in the House, to-wit, H. R. 12175, also providing for a year's extension for term insurance. I transmit at this time a copy of a part of a statistical study which was made in connection with the House bill as to the estimated cost of extending term insurance for one year. Taking into consideration that of the cases affected, the principal item of cost was by reason of claims under Section 305, you will note that the estimated cost of H. R. 12175 was given as $1,011,750 for the first year and an equal amount for the second year.

Viewing the situation now in retrospect I have caused a study to be made of the actual number of cases involving yearly renewable term insurance and the cost where insurance was revived under Section 305 of the World War Veterans Act and where the permanent and total disability or death occurred in the interval of the year extension from July 2, 1926, to the corresponding date in 1927. A copy of this study is also transmitted and from it you will note that 718 awards under Section 305 have been made to date in those cases where the permanent and total disability or death occurred within the year extension with the net commuted value of the revived insurance as $3,545,777. In other words the cost to the United States Government to date in the revival of term insurance under Section 305 for the one year extension

has been slightly in excess of three and one-half million dollars.

If, therefore, the date of permanent and total disability or death is not limited to July 2, 1927, in the Section 305 cases it would be fair to assume that approximately the same number of cases might be expected each year for a period of several years from 1927 on—a total in the neighborhood of 700 annually with an amount of insurance thus revived of approximately three and one-half million dollars per year. Due to the fact that adjustments in rates of compensation tend to become less frequent as the period involved becomes more remote and that the number of cases where service connection is first established tends to become smaller each year a gradual decrease in the number of cases may occur in the future. The net amount of insurance paid per case will also tend to grow somewhat less because of the deductions of back premiums and interest over a longer period of time than was involved in the earlier cases. Even allowing for these factors, however, it must be concluded that a substantial number of cases will be affected each year prospectively, over a long period of time, and that the final total cost will aggregate many millions of dollars.

Sincerely,

(s) Frank T. Hines,
FRANK T. HINES,
Administrator.